

83-1080

Office-Supreme Court, U.S.

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No. \_\_\_\_\_

ALEXANDER L. STEVENS,  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,  
*Petitioner,*

v.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

On Writ of Certiorari  
to the  
United States Court of Appeals  
for the Eighth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

*Of Counsel:*

LYNN K. VORBRICH  
Iowa Power and Light Company  
666 Grand Avenue  
Des Moines, Iowa 50309

CURTIS L. RITLAND  
1100 Des Moines Building  
Des Moines, Iowa 50307

JOHN M. CLEARY  
\*FREDERIC L. WOOD  
NICHOLAS J. DiMICHAEL  
914 Washington Building  
1435 G Street, N.W.  
Washington, D.C. 20005  
Tel. (202) 783-1215

DATED: December 31, 1983

\*Counsel of Record  
for Petitioner

(i)

**QUESTION PRESENTED**

**Whether the Interstate Commerce Commission has the authority to allow a tariff to be filed which has retroactive effect.**

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IOWA POWER & LIGHT COMPANY,  
*Petitioner,*

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On Writ of Certiorari  
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United States Court of Appeals  
for the Eighth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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Iowa Power and Light Company petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.<sup>1</sup>

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<sup>1</sup>As required by Rules 21.1 and 28.1, the parents, affiliates, and subsidiaries of Iowa Power & Light Company are as follows: Iowa Resources Inc. (parent); Redlands, Inc., Enercor, Inc., Industries of Iowa Corp., Enserco, Inc., Middlewood Inc., Unitrain Inc., Iowa Computer Resources Inc., Westcon Inc. (affiliates); and Iowa Power Resources Inc. (subsidiary).

## OPINIONS BELOW

The opinion of the court of appeals (Appendix A, 1a-10a) is reported at 712 F.2d 1292. The decision of the Interstate Commerce Commission (Appendix B, 11a-20a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 3, 1983 (Appendix C, 21a). The time for filing this petition was extended to December 31, 1983.<sup>2</sup> The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. §§1254(1) and 2350; this case falls within the jurisdictional provisions of these statutes because it involves a review of a final judgment (Appendix C, 21a) of the U.S. Court of Appeals for the Eighth Circuit which in turn was reviewing an order of the Interstate Commerce Commission under 28 U.S.C. §§2321 and 2341-2350.

## STATUTES INVOLVED

The relevant statutes, 49 U.S.C. §10761 and §10762 (part of the Interstate Commerce Act) are set out in Appendix D, 22a-26a.

## STATEMENT

1. Since February, 1978, petitioner Iowa Power and Light Company has operated for itself and six joint owners a coal-fired electric generating station at Council Bluffs, Iowa. Coal for the station is transported by rail from Belle Ayr, Wyoming to Council Bluffs by the Burlington Northern Railroad Company (BN, a respondent). The coal is transported by BN in unit-trains of cars owned by Iowa Power under tariffs filed with the Interstate Commerce Commission (I.C.C., also a respondent) under 49 U.S.C. §10761.

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<sup>2</sup>By orders entered October 14 and November 28, 1983 by Circuit Justice Blackmun in No. A-266.

2. After a period of litigation from 1978 to 1981 which resulted in the issuance by the agency of a rate prescription order,<sup>3</sup> the BN filed a tariff establishing a rate at the level agreed to by Iowa Power and BN a few years before the movement began. Then, on October 9, 1981, BN filed with the I.C.C. a tariff increasing the rate, effective November 1, 1981. At the request of Iowa Power, the tariff was rejected by the I.C.C. because it was inconsistent with the prescription order. But a U.S. Court of Appeals held that the first rejection was not proper.<sup>4</sup>

3. On July 14, 1982, the BN filed another tariff, to become effective on one day's notice, publishing the same increased rate previously rejected, effective retroactively to November 1, 1981. Iowa Power requested the I.C.C. to reject the tariff because it was unlawfully retroactive and because it lacked the required statutory notice under 49 U.S.C. §10762(c)(3). The tariff was rejected only for the reason that it lacked the necessary 20-day notice. After the BN appealed the I.C.C. authorized the BN to file the tariff with the retroactive effective date of November 1, 1981 in a decision served December 23, 1982 (Appendix B, 11a-20a). However, BN was required to file the tariff with the statutory 20 days' notice. The I.C.C. believed that it was necessary to permit the retroactive tariff as an exercise of its "equitable power" in order to correct the situation created by the legal error of its 1981 rejection, relying in large measure on this Court's decision in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965). (Appendix B, 13a) The I.C.C. also contended that its action did not conflict with the filed rate doctrine, as stated in this Court's decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1982). (Appendix B, 17a-18a).

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<sup>3</sup>See *Incentive Rate on Coal, Belle Ayr, WY to Council Bluffs, IA*, 359 I.C.C. 201 (1978); *Unit-Train Rates on Coal - Burlington Northern Inc.*, 361 I.C.C. 655 (1979), reversed, 364 I.C.C. 186 (1980), affirmed, *Iowa Power and Light Company v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), cert. den. 455 U.S. 907 (1981).

<sup>4</sup>*Burlington Northern Railroad Company v. I.C.C.*, 679 F.2d 934 (D.C. Cir. 1982).

4. Shortly before that 1981 rejection, Iowa Power commenced a civil action against BN seeking necessary and appropriate relief to require the railroad to file a tariff with the rates agreed to before the generating station was placed in service.<sup>5</sup> In a judgment entered on December 23, 1983, the district court found that Iowa Power and BN had a valid and enforceable contract for the movement of coal, that BN should be enjoined from breaking that contract by filing a tariff not consistent with the contract, and that BN should refund to Iowa Power any money received under tariffs in excess of the rates specified in the tariff. However, BN has said it will appeal the district court decision.

5. Iowa Power sought judicial review of the I.C.C.'s decision to allow the BN to file the retroactive tariff under 28 U.S.C. §2321 and §§2341-2350 in the U.S. Court of Appeals for the Eighth Circuit.<sup>6</sup> While the judicial review proceedings were pending, the tariff containing the retroactive increase in rates was filed on January 21, 1983 by BN, and was allowed by the I.C.C. to go into effect on February 10, 1983, even though Iowa Power requested an investigation and suspension of the tariff under 49 U.S.C. §10707.<sup>7</sup> On July 12 Iowa Power paid BN \$9,067,065.26 for the retroactive increase in rates (including interest) as applied to shipments between November 1, 1981 and February 9, 1983. However, the BN now takes the position that the refund award made by the district court in the contract case would only require BN to repay to Iowa Power \$5,165,705.38 of the amount paid under the provisions of the retroactive tariff. Therefore, even if the district court decision is affirmed on appeal, a substantial amount remains at issue because of the court of appeals decision sought to be reviewed here.

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<sup>5</sup>*Iowa Power and Light Co. v. Burlington Northern Railroad Co.* (Civil Action No. 81-526-B, S.D. Iowa, filed October 27, 1981).

<sup>6</sup>*Iowa Power and Light Co. v. United States* (No. 82-2550, filed December 28, 1982).

<sup>7</sup>*Retroactive Rate on Coal, Belle Ayr and Eagle Junction, WY to Council Bluffs, IA* (not reported, Suspension Case No. 70992, decided February 9, 1983).

6. That decision (App. 1a-10a) upheld the I.C.C.'s action. The court of appeals found that neither 49 U.S.C. §10761(a) nor the filed rate doctrine set out in this Court's decision in *Arkansas Louisiana Gas Co. v. Hall, supra*, barred the I.C.C.'s action. In addition, it found that under its view of this Court's decision in *United Gas Improvement Co. v. Callery, supra*, the I.C.C. had an inherent equitable authority to allow the retroactive tariff to be filed. Finally, the court of appeals found that the I.C.C.'s action was not arbitrary and capricious.

### REASONS FOR GRANTING THE WRIT

The issues in this case are important, and involve substantial questions of federal law. The correctness of the I.C.C.'s action allowing the filing of a retroactive tariff under the Interstate Commerce Act and the filed rate doctrine is one of first impression in this Court. In addition, that action, as approved by the court of appeals, conflicts with applicable decisions of this court the inherent authority of an administrative agency to permit equitable exceptions to the filed rate doctrine. Finally, the court of appeals decision could be inconsistent with this Court's resolution of the issues in a case in which a writ of certiorari has already been granted.

1. Throughout the history of the Interstate Commerce Act, the I.C.C. has interpreted Section 10761<sup>a</sup> as not permitting retroactive tariffs. "Tariffs can not be given a retroactive effect; they can not be made to apply to conditions other than those existing upon the date when such tariffs become effective." *Through Routes and Through Rates*, 12 I.C.C. 163, 172 (1907). The rationale behind this interpretation was plainly stated by the I.C.C. in *Interstate Remedy Co. v. American Express Co.*, 16 I.C.C. 436, 438-439 (1909):

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<sup>a</sup>And its predecessor statute, Section 6. The Act was recodified in 1978 without substantive change. Pub. L. 95-473, 92 Stat. 1337 (1978). See also H.R. Rep. No. 95-1395, 95th Cong. 2d. Sess. 4-5 (1978).

"A schedule of rates extended by a carrier to the shipping public may be cancelled upon giving thirty days' notice in conformity with the law. But such cancellation is not to be construed as a withdrawal of all rights arising under such tariff to those who have availed themselves of its provisions prior to the date that such tariff dies. If this were not so, a shipper could never know whether rights and privileges extended by the carriers in their lawful tariffs would be available for the period fixed therein. It would be manifestly within a carrier's power to withdraw, by cancellation, at any time such rights as the tariffs offered at the time of shipment, thus leaving the shipper at the mercy of the carrier . . . . This is a view of the law which would be utterly impracticable and vicious in its effects. The shipper must know at the time of tender of shipment from the tariffs themselves what rate he must pay and what rights thereunder he may secure.

\* \* \*

"The date of original shipment determines the rights, privileges, and obligations attaching to that shipment throughout its transportation; and this must be determined by the tariff in force upon that date."

The unavailability under the statute of the right to file retro-active tariffs has been recognized by this Court. In reliance on arguments made by the I.C.C. and the United States,<sup>9</sup> this Court stated that a federal court may not freeze a rate that a shipper is charged in a tariff filed by a railroad:

"Because the reparations provisions do not apply to both shippers and carriers, losses suffered by the carriers cannot be recovered. Carriers are not adequately protected by their authority under §§10761 and 10762 to file a new rate. . . ."

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<sup>9</sup>Brief for Federal Respondents in No. 81-1008, *Burlington Northern Inc. v. United States* (May, 1982), p. 39.

*Burlington Northern Inc. v. United States*, 459 U.S. 131, \_\_\_\_ 74 L. Ed. 2d 311, 321 (1982) *reh. den.* \_\_\_\_ U.S. \_\_\_\_, 75 L. Ed. 2d 471 (1983). After urging this Court to recognize the long-standing rule against retroactive tariffs, the I.C.C. reversed in this case its established interpretation of §10761 and §10762.

The court of appeals mistakenly failed to recognize the strict application required by this Court of the provisions of the statute directing observance of tariffs. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924) and *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).<sup>10</sup> The court of appeals failed to appreciate that, unless the Act specifically authorizes the Commission to permit a variation from an effective tariff, it is without authority to do so. The statute could not be more explicit:

"Except as provided in this subtitle, a carrier providing transportation or service . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect . . . ."

49 U.S.C. §10761(a). If the tariff is not "in effect" when the transportation is provided, no different rate may, then or thereafter be charged, "[e]xcept as provided" elsewhere in the Act.

Neither the court of appeals nor the I.C.C. relied on any provision of the Act that expressly authorizes the Commission to allow the BN to file a retroactive tariff. The court of appeals failed to recognize that the strict observance of tariffs, while it may have harsh results,<sup>11</sup> allows only such exceptions as the Congress permits.

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<sup>10</sup>See also *Western Transportation Co. v. Wilson & Co., Inc.*, 682 F.2d 1227, 1229 (7th Cir. 1982).

<sup>11</sup>E.g., *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 343-344, 352 (1982).

Congress has included several such statutory exceptions.<sup>12</sup> For example, under 49 U.S.C. §10707(d)(2), if the I.C.C. suspends the effectiveness of a tariff containing a proposed rail rate, and later finds the proposed rate to be lawful, the carrier may then collect from the ratepayers the difference between the effective tariff and the suspended tariff. The court of appeals, while conceding that §10707(d)(2) does not expressly authorize the I.C.C.'s action, concluded that its action was "not inconsistent." (Appendix 6a) But Congress has not authorized the Commission in the Act to allow retroactive tariffs, and until it does so, the Commission's action is beyond its statutory authority.

2. The I.C.C.'s action, as approved by the court of appeals, is also contrary to this Court's recent decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). This Court said there that the "filed rate doctrine" prevents an administrative agency from altering a rate retroactively. 453 U.S. at 578. This Court did note that there may be particular statutory exceptions to the filed rate doctrine.<sup>13</sup> But no such statutory exception has been relied on by either the I.C.C. or the court of appeals. The filed rate doctrine, created to support the tariff filing requirements of §10761, precludes any action by the I.C.C. to permit the BN to replace retroactively the rate in effect between November 1, 1981 and February 9, 1983.<sup>14</sup> The court of appeals has misapplied the doctrine as it has been established by this Court.

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<sup>12</sup>E.g., 49 U.S.C. §11705 (reparations); §10707 (refunds); §10713 (contract rates); and §10505 (exempt traffic).

<sup>13</sup>At 453 U.S. 578, n. 8, it was noted that the FERC may have statutory authority to permit retroactive filing under 15 U.S.C. §717c(d). However, by its terms that statute seems to be limited to reducing the 30-day period for notice of tariff changes. Also see *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), *reh. den.* 700 F.2d 218 (1983), *cert. den.* \_\_\_\_ U.S. \_\_\_\_, 52 U.S.L.W. 3262 (1982).

<sup>14</sup>When the I.C.C. rejected the BN's tariff on October 30, 1981, by the terms of 49 U.S.C. §10762(e), it was void. (Before the 1978 recodification (*supra*, n. 8), the statute (Section 6(6)) explicitly stated that a rejected tariff was void and its use unlawful.) Therefore, the filed rate then in effect was the rate the BN had sought to replace with

The filed rate doctrine is applied across a broad spec- industries subject to federal regulatory authority. 453 U.S. at 577-578; *Arkansas Louisiana Gas, supra*, 453 U.S. at 577-578. However, the doctrine has its historical antecedents in cases interpreting the Interstate Commerce Act. *Id.* For example, in *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-197 (1913), this Court said:

"The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; *nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper.* (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6. *Armour Co. v. United States*, 209 U.S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

[emphasis added]

It should be noted that, except for the limited exception created by §10707(d)(2), there is still no provision in the Act allowing a carrier to obtain "reparations" when it is later found that the rate it collected from the shippers for transportation provided under the effective tariff needs to be increased. *Burlington Northern Inc. v. United States, supra*. Until Congress adds such a provision to the Act, the decision of the court of appeals allowing the I.C.C. to create such a remedy for the benefit of the BN or any other carrier is in error.

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the rate in the rejected tariff. Of course, when the retroactive tariff was filed, Iowa Power was immediately required to, and did, pay the undercharges. Cf. *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-485 (1939).

In that regard, this case is very similar to another case cited by this Court in *Arkansas Louisiana Gas Co., supra*, 453 U.S. at 577. In *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), this court held that an implied remedy for reparations could not be created for motor carrier shippers when none was created by Congress. Relying on the filed rate doctrine as set out in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), this Court noted the significant omission of any statutory reparations remedy against motor carriers. 359 U.S. at 468-472.

Moreover, the Court also barred the creation under a common law theory of a remedy which would permit "the I.C.C. to accomplish directly what Congress has not chosen to give it the authority to accomplish directly." 359 U.S. at 472-475.<sup>13</sup> Likewise, in this case, the court of appeals has permitted the Commission, by allowing the filing of retroactive railroad tariffs, to create a remedy which Congress had not included in the Act.

3. The court of appeals also incorrectly found that the I.C.C. possessed inherent authority to allow the retroactive tariff in order to correct an error. This Court long ago established that the I.C.C. lacks any inherent or general authority to change a rate in order to provide equitable relief. *Southern Pacific Co. v. I.C.C.*, 219 U.S. 433, 442-444, 451-452 (1911). This is an important corollary of the well-established principle that the effective tariff on file must be observed by both carrier and shipper, even when it contains manifestly unlawful rates, until the Commission properly exercises its statutory authority to change the tariff prospectively and award reparations. *Arizona Grocery*

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<sup>13</sup>Congress later added what are now the provisions of 49 U.S.C. §11705(b)(3) and §11706(c)(2) to the Act, allowing shippers to recover reparations from motor carriers for past unreasonable rates. See Pub. L. 89-170, §6, 79 Stat. 648 (1965), adding what was then 49 U.S.C. §304a(2) and (5). Cf. *National Motor Ft. Traffic Ass'n. v. United States*, 268 F. Supp. 90 (D.D.C. 1967) and *Informal Procedure for Determining Reparation*, 335 I.C.C. 403 (1969).

*Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 383-389 (1932) and *Davis v. Portland Seed Co.*, 264 U.S. 403, 424-426 (1924).

This Court's decision in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229-230 (1965) was erroneously viewed by the court of appeals and the I.C.C. as supporting the existence of an inherent authority to permit retroactive tariffs. But both tribunals failed to recognize that the result in that case depended on the specific statutory authority given to the Federal Power Commission by Section 7 of the Natural Gas Act, 15 U.S.C. §717f, to attach conditions to certificates of public convenience and necessity issued to gas producers.<sup>16</sup> No such statutory authority exists here, as was expressly conceded by the court of appeals (Appendix 6a). As this Court's decision in *Arkansas Louisiana Gas v. Hall*, *supra*, plainly indicates, such statutory authority is essential to avoid the strict requirement for observance of the tariff in effect at the time the transportation or service is provided. And to the extent the court of appeals may have construed the holding of *United Gas Improvement Co. v. Callery Properties*, *supra*, as creating a non-statutory exception to the filed rate doctrine, then this novel theory alone requires review by this Court to settle the question of the scope of the doctrine.

4. This Court is presently considering three similar cases involving the application of the filed rate doctrine and the authority of the I.C.C. to retroactively modify tariffs filed with it. In No. 82-1643, *I.C.C. v. American Trucking Associations* (cert. granted, June 20, 1983, 51 U.S.L.W. 3901), this Court is reviewing the decision of the U.S. Court of Appeals for the Eleventh Circuit in *American Trucking Associations, Inc. v. United States*, 688 F.2d 1337, 1354-1356 (1982) that the I.C.C. may not retroactively reject a filed tariff after its effective date.

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<sup>16</sup>See Section 7(e), 15 U.S.C. §717f(e) and 385 U.S. at 226, 229. See also *Panhandle Eastern P.L. Co. v. FERC*, 613 F.2d 1120, 1131-1132, at note 60 (D.C. Cir. 1979), *cert. den.* 449 U.S. 889 (1980).

In addition, petitions for writs of certiorari remain pending<sup>17</sup> to review a conflicting decision on the same issue from the Fifth Circuit in *Aberdeen R. R. Co. v. United States*, 682 F.2d 1092 (1982). The court of appeals decision in this present case could be in conflict with this Court's resolution of the issues in No. 82-1643. If the Court decides that the I.C.C. may not retroactively reject a filed and effective tariff, then neither can the I.C.C. permit the retroactive modification of a tariff such as was involved here. In either case, such retroactive action would create unforeseen consequences for shippers or carriers who relied on the effective tariff. This case thus involves the same type of substantial question as that which warranted review in No. 82-1643.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

LYNN K. VORBRICH  
Iowa Power and Light Company  
666 Grand Avenue  
Des Moines, Iowa 50309

CURTIS L. RITLAND  
1100 Des Moines Building  
Des Moines, Iowa 50307

JOHN M. CLEARY  
\*FREDERIC L. WOOD  
NICHOLAS J. DiMICHAEL  
914 Washington Building  
1435 G Street, N.W.  
Washington, D.C. 20005  
Tel. (202) 783-1215

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\*Counsel of Record  
for Petitioner

DATED: December 31, 1983

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<sup>17</sup>Nos. 82-707 and 82-804, filed October 22 and November 12, 1982, respectively.

**APPENDIX A**

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**No. 82-2550**

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**Iowa Power and Light Company,**

**Petitioner,**

**v.**

**United States of America  
and Interstate Commerce  
Commission,**

**Respondents.**

**Petition for Review  
of Order of Interstate  
Commerce Commission.**

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**Submitted: April 14, 1983**

**Filed: August 3, 1983**

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**Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit  
Judge, and JOHN R. GIBSON, Circuit Judge.**

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**HENLEY, Senior Circuit Judge.**

The major issue to be decided in this appeal is whether the Interstate Commerce Commission, consistent with its enabling legislation, can allow an incorrectly rejected tariff to take effect as of the date it would have been implemented but for the agency's prior erroneous rejection. Concluding that the Commission's action in the present case did not impermissibly conflict with the Interstate Commerce Act, and was not arbitrary or capricious, we affirm.

## I

This appeal represents the latest chapter in an ongoing dispute between petitioner Iowa Power and Light Company (IPL), a public utility, and Burlington Northern Railroad Company (BN) concerning the shipment of coal from a Wyoming mine to the utility's generating plant at Council Bluffs, Iowa. Central to the controversy is a "letter of understanding" signed by the parties in connection with the coal shipments. This letter included, among other items, a base rate and rate escalation formula for rail transportation of coal from the Wyoming mine to Council Bluffs. Since February of 1978, when shipments began, IPL has received coal transported by BN; the utility is the only shipper involved in this particular transaction.

In the same year the coal shipments started, BN submitted a tariff to the ICC specifying a rate higher than that initially agreed upon by the parties in the letter of understanding. Following the filing of a petition and complaint by IPL, see 49 U.S.C. § 10707, the Commission determined that the rate specified in the letter of understanding was a just and reasonable maximum rate. Its prescription order, dated October 1, 1980, directed BN to file tariffs consistent with the parties' prior agreement. This court subsequently denied the railroad's petition for review, upholding the Commission's action.<sup>1</sup> *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

Thereafter, in October of 1981, BN submitted Supplement 4 to the tariff it had filed following entry of the Commission's prescription order. This supplement proposed an increase to \$10.95 from the agreed-upon rate, which at that time was \$7.62. Acting in response to a letter of protest filed by IPL, the ICC on October 30, 1981 rejected Supplement 4 on the ground that it

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<sup>1</sup>The agency's prescription order was entered after reconsideration by the ICC. A more detailed description of this aspect of the parties' dispute is set forth in our prior opinion. *Iowa Power & Light Co. v. Burlington N., Inc.*, 647 F.2d at 801-02.

constituted a violation of the agency's previously issued prescription order. During this period, IPL initiated a breach of contract action against BN, seeking a declaratory judgment, injunctive relief and damages. *Iowa Power & Light Co. v. Burlington Northern Railroad Co.*, Civil No. 81-526-B (S.D. Iowa filed Oct. 27, 1981). That action remains pending.

After the Commission's adverse decision with respect to Supplement 4, BN filed a petition for review with the District of Columbia Circuit. That court vacated the agency's order, holding that "when a rate increase is tendered to the ICC after the effective date of the Staggers Act and the tendered rate is allegedly below the Section 202 market dominance threshold, the Commission may not reject the rate simply because it is above the level specified in an outstanding prescription order or pre-Act rate agreement." *Burlington Northern Railroad Co. v. ICC*, 679 F.2d 934, 942 (D.C. Cir. 1982). The case was remanded to the Commission, and BN thereafter submitted Supplement 8, which again proposed a rate of \$10.95 for the coal transportation at issue. In addition, this supplement provided that the proposed rate was to be effective as of November 1, 1981, the date Supplement 4 would have taken effect absent the Commission's prior rejection.

In a decision dated December 9, 1982, the ICC approved Supplement 8 and authorized the retroactive application of the \$10.95 rate. The Commission reasoned that because its legal error alone had prevented the railroad from collecting the higher rate since November 1, 1981, it was compelled to use its equitable powers "to make BN whole." The agency further ruled, however, that IPL would not be required to immediately repay the back amount due; rather, the parties were directed to apprise the Commission of the amount owed by the utility under Supplement 8 and suggest a reasonable payment schedule, which would thereafter be determined by the agency.<sup>3</sup> This order is now before us on IPL's petition for review.

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<sup>3</sup>In a subsequent order dated June 7, 1983, the ICC determined the amount of principal and rate of interest to be paid by IPL, and

## II

In contesting the Commission's decision, IPL initially challenges the agency's authority to allow retroactive application of the previously rejected rate. Specifically, the utility urges that the ICC's action contravenes both the Interstate Commerce Act and the "filed rate doctrine" and that the Commission does not possess the general equitable powers necessary to permit the action taken.

The framework for our review of the Commission's decision is supplied by the Administrative Procedure Act. Pursuant to that statute, agency action may be set aside if found to be, *inter alia*, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). To the extent necessary, all relevant questions of law, including the interpretation of statutory provisions, are to be resolved by the reviewing court. 5 U.S.C. § 706. In addition, we observe that the interpretation "of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

## A

The focus of IPL's primary contention concerning the Commission's authority to allow retroactive implementation of the previously rejected rate is 49 U.S.C. § 10761(a), which provides in pertinent part:

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier

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directed the utility to establish a payment schedule that, within a specified time-frame, would best fit its needs. The propriety of this order is not now before us.

may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

The utility argues that the Commission's action in the present case contravenes both this provision and the "filed rate doctrine," and that it therefore must be rescinded. We cannot agree.

Although the initial sentence of section 10761(a) seemingly supports the contention advanced by IPL, we believe a reading of the provision as a whole demonstrates that it was not designed to prevent action such as that taken by the Commission in this case. The final sentence of the provision indicates that through this section Congress primarily intended to prevent carriers from discriminating among shippers, *see Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939) (predecessor of section 10761(a) "forbids [a] carrier from giving a voluntary rebate in any shape or form"); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (prohibition against deviation from carrier's filed rate "embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination"), and it is clear that the Commission's action in the present circumstances does not conflict with that underlying purpose. IPL is admittedly the only shipper involved with BN in the disputed transaction, and clearly there is no danger of rate discrimination as a result of the ICC's order. Applying section 10761(a) to bar the action taken by the Commission in this case would do nothing to advance the major purpose upon which that provision is premised — the prevention of rate discrimination among shippers by a carrier. *Cf. Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Co.*, 297 F.2d 793, 798 (8th Cir. 1962) (no opportunity for discrimination apparent in misrouting situation). In these circumstances, we cannot agree that the Commission's correction of its prior error through the

retroactive application of the previously rejected tariff conflicts with section 10761(a) and must therefore be overturned.

Moreover, the Commission's order does not conflict with the general mandate of the Revised Interstate Commerce Act. Nothing in the Act expressly prohibits the ICC from allowing the retroactive application of a tariff in the limited circumstances of this case; more significantly, the challenged action is consistent with the role contemplated for the ICC under the Act. Several statutory provisions authorize the Commission, in certain circumstances, to alter action it has previously taken. See 49 U.S.C. §§ 10324(b), 10327(g)(1). Further, under section 10707(d)(2), a carrier may receive reparations for underpayments which result from the agency's suspension of a rate later determined to be reasonable. The Commission's action in the present case, in terms of cause and effect, is comparable to an order requiring the payment of reparations under section 10707(d)(2). Essentially, both are designed to rectify inequities created by prior Commission action, and the means of correcting the prior error in each situation involves payment by shippers of the rate which should have been allowed under the tariff as originally requested. The above-mentioned statutory provisions, although not expressly authorizing the action taken by the ICC in this case, clearly indicate that it is not inconsistent with the Commission's specific authority under the Act.

For similar reasons, we are not persuaded that the "filed rate doctrine" bars the action taken by the ICC in this case. This doctrine, "which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory agency," *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981), has as its source several Supreme Court decisions interpreting the Interstate Commerce Act and other regulatory statutes. See, e.g., *Lowden*, 306 U.S. at 520-21; see also *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). Two considerations, "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge

only those rates of which the agency has been made cognizant," serve as its primary predicates. *Arkansas Louisiana Gas*, 453 U.S. at 577-78 (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). The Commission's action in the present case is fully consistent with each of these underlying considerations.

Retroactive application of the previously rejected rate does not undermine the ICC's primary jurisdiction in the matter of rates; the Commission's action does not constitute abandonment of its supervisory role over the reasonableness of the rate charged by BN. Indeed, the agency has subsequently determined that the rate in question falls within its jurisdiction, *Retroactive Rate on Coal, Belle Ayr and Eagle Junction, Wyoming to Council Bluffs, Iowa*, Suspension Case No. 70992 (ICC Feb. 9, 1983), and although it declined to investigate the tariff at that stage, the Commission may still render a final determination concerning the rate's reasonableness upon the filing of a complaint by IPL. See 49 U.S.C. § 11701. Nor is there any indication that by permitting the previously rejected tariff to take effect retroactively, the ICC has in any way enabled BN to charge a rate unknown to the agency. Thus, it is apparent that the challenged action is entirely consistent with the considerations underlying the "filed rate doctrine." The mechanical application of the doctrine urged by IPL would not serve to promote those considerations in the present case, and we therefore cannot agree that the Commission's remedial measure must be disallowed. Cf. *Maine Public Service Co. v. FPC*, 579 F.2d 659, 666-67 (1st Cir. 1978) (where its underlying considerations were not implicated, "filed rate doctrine" did not require disallowance of surcharge by FPC).

We are convinced that the remedial action taken by the ICC is consistent with both the Interstate Commerce Act and the "filed rate doctrine." Consequently, we conclude that neither requires that the Commission's decision be overturned.

## B

In a related argument, IPL suggests that the Commission lacks the equitable authority to correct its prior error in this

case. Essentially, the utility urges that the ICC cannot utilize equitable or inherent agency authority where, as is allegedly the situation here, the exercise of that authority conflicts with the agency's enabling legislation. We reject this contention.

The Supreme Court has recognized in analogous circumstances that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). At issue in *Callery Properties* was a Federal Power Commission order which required gas producers to refund to their customers the difference between amounts previously collected under judicially invalidated certificate orders and a price subsequently established by the Commission. The Court concluded that the agency had the authority to issue the refund order despite the fact that it had "no power to make reparation orders, . . . its power to fix rates . . . being prospective only . . .", *Id.* The action taken by the ICC in the present case is comparable to that upheld in *Callery Properties* — the Commission has acted to undo what was wrongfully done by virtue of its prior order rejecting the increased rate requested by BN. Similar agency corrective action has been sanctioned in other contexts. *See, e.g., Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446 (D.C. Cir. 1972).

We cannot agree that the Commission was without authority to allow the erroneously rejected tariff to take effect retroactively as a means of correcting its prior error, we are not persuaded that the ICC has acted in a fashion "repugnant" to its enabling legislation, and, as indicated, the Commission's action is fatally inconsistent with neither the provisions of the Interstate Commerce Act nor the "filed rate doctrine."<sup>3</sup>

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<sup>3</sup>In a recent letter counsel for IPL has cited as supporting IPL's position a decision of the Commission served June 28, 1983 in its Docket Ex Parte No. 394 (Sub-No. 1), *Cost Ratio for Recyclables — 1983 Determination*, in which the Commission states: "[S]hippers may receive refunds or reparations for overpayment *but carriers can never be made whole for underpayments.*" (Emphasis added.) That statement, however, was in different context and is not persuasive here.

In short, we are satisfied that the ICC does not lack the authority to correct its prior error in this case by allowing the rejected tariff to take effect retroactively, and that the exercise of its authority here is consistent with applicable legislative provisions.

### III

IPL's assault upon the Commission's order also proceeds along a second front. Even assuming the ICC has the authority to allow the rejected tariff to take effect retroactively, the utility argues, its action here was arbitrary and capricious and must be set aside.

The Administrative Procedure Act authorizes a reviewing court to overturn agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In evaluating administrative action under this section

the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . .

Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted); see generally 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* Ch. 51 (1983).

Our review convinces us that the Commission's action was not arbitrary and capricious. The gravamen of IPL's contention in this regard is that the agency failed to weigh the equities in the utility's favor, and instead based its decision solely on the hardship incurred by BN. The record belies this assertion. By allowing IPL to repay the back amount due under Supplement 8 over a payment schedule to be subsequently determined, rather than in a lump sum, the Commission clearly acted in consideration of the utility's alleged repayment difficulties. In addition, the agency's decision does not preclude IPL from pursuing other avenues of relief. The utility is free to initiate an administrative challenge to the reasonableness of the \$10.95 rate, see 49 U.S.C. § 11701, and its breach of contract action, through which the damages alleged-

ly incurred as a result of BN's implementation of a rate higher than that delineated in the parties' "letter of understanding" could conceivably be recouped, remains pending in federal district court. In these circumstances, we cannot say that the equitable balance struck by the Commission, and the remedial action taken to effectuate that balance, were arbitrary and capricious.<sup>4</sup>

#### IV

In sum, we conclude that the ICC acted within its authority in allowing the incorrectly rejected tariff to take effect retroactively, and that its action was not arbitrary and capricious. Accordingly, the petition for judicial review is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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<sup>4</sup>In July of 1982, when BN initially submitted Supplement 8, the Commission's Tariff Section rejected the proposed tariff for failure to comply with the notice requirements of the Interstate Commerce Act and the ICC's tariff rules. BN appealed this decision to the full Commission, and the agency on December 9, 1982 issued its order allowing the tariff to be implemented retroactively. In addition to challenging the validity of this order, IPL also contends the Commission acted arbitrarily insofar as it permitted the tariff to cover the period between July and December, 1982. The inapplicability of the higher rate in this interim, the utility argues, is the result of BN's failure to simply refile Supplement 8 with the requisite notice in July. Consequently, the Commission, which ultimately upheld the determination that Supplement 8 had been filed without proper notice, should have declined to include this period within the time-frame covered by the tariff. We find this argument to be without merit. BN acted within its rights in appealing to the full Commission and securing a determination as to the propriety of the tariff's proposed retroactivity; it cannot be held responsible for the length of time involved in the agency's decision-making process. Given these circumstances, we cannot say the Commission acted arbitrarily in allowing the tariff to be effective over the July 1982 - December 1982 period.

**APPENDIX B****INTERSTATE COMMERCE COMMISSION**[Service Date Dec 23 1982]      **Decision****Docket No. 38885****BURLINGTON NORTHERN RAILROAD COMPANY —  
PETITION FOR RECONSIDERATION OF REJECTION****Decided: December 9, 1982**

We have before us a petition for administrative review filed by the Burlington Northern Railroad Company(BN). It involves Supplement 8 to Tariff ICC BN 4187-A. Supplement 8 would establish a base rate of \$10.95 per ton for the transportation of coal to the Council Bluffs, Iowa generating plant of Iowa Power and Light Co. (IPL). It further provides for the \$10.95 rate to be the effective rate since November 1, 1981. Supplement 8 was filed with the Commission on July 14, 1982 with a proposed effective date of July 15, 1982.

Supplement 8 was rejected on July 16, 1982, because of the failure to provide statutory notice, as required by 49 U.S.C. 10762(c)(3) and 49 C.F.R. 1300.14(a)(ii), and to include a title page notation showing authority for publication on short notice, as required by 49 C.F.R. 1300.3(h). The retroactive effectiveness of the proposed rate was not discussed. However, the parties were advised that, if the rejection were appealed, they should address the propriety of retroactively reinstating the \$10.95 rate. The BN did so in its July 26, 1982 petition for review; IPL, the only shipper, did so in its reply filed August 16, 1982. Having considered their arguments, we will allow the railroad to refile Supplement 8 on 20 days' notice.

**Background**

In 1978, BN began transporting coal to the Council Bluffs, Iowa generating plant of IPL. That year, BN sought to increase its rate above the level agreed to by the railroad and IPL in a 1976 "letter of understanding." After an investigation, we found the increased rate unreasonably high and prescribed the agreed rate as the maximum reasonable rate. *Unit-Train Rates on Coal-*

*Burlington Northern, Inc.*, 364 I.C.C. 186 (1980), *affirmed*, *Iowa Power and Light Co. v. Burlington Northern Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982).

On October 30, 1981, at IPL's request, we rejected Supplement 4, which would have increased the prescribed rate to \$10.95. The railroad appealed this decision. In *Burlington Northern Railroad Company v. ICC*, 679 F.2d 934 (D.C. Cir. 1982), the reviewing court held that a tariff allegedly below the market dominance threshold set forth in 49 U.S.C. 10709 may not be rejected simply because the rate exceeds the level prescribed in an outstanding order or a pre-Staggers Act agreement.<sup>1</sup> If the \$10.95 rate is below the jurisdictional threshold, the court concluded, the Commission must accept the supplement. The Commission order was vacated and the court remanded it to us for further action consistent with its opinion. *Id.* at 942. Thereafter, BN filed Supplement 8.

#### **The Parties' Positions**

The railroad contends that the sole basis for IPL's objection to Supplement 4, and our rejection of it, was that the proposed rate conflicted with a prescription order based on a pre-Staggers Act agreement. But for our legal error, that supplement would have become effective on November 1, 1981 and the BN would have been entitled to collect the higher rates published therein. BN argues that equitable considerations necessitate that we undo the effect of our error by placing the parties in the positions they would have occupied had the tariff not been wrongfully rejected. The railroad also avers that since statutory notice was provided when it attempted to file Supplement 4, no further notice is necessary because Supplement 8 effectively reissues Supplement 4.

IPL asserts that retroactive tariffs are barred by 49 U.S.C. 10761(a), which requires that a carrier provide its service "only

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<sup>1</sup>The pertinent provisions of 49 U.S.C. 10709 were added by the Staggers Rail Act of 1980, P.L. 96-448.

if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter." Since tariffs may not be given retroactive effect, the Commission cannot reinstate a tariff not in effect at the time the traffic moved. IPL argues that exercise of our equitable powers does not allow us to contravene the Interstate Commerce Act. Moreover, IPL asserts that Supplement 8 contains new matter,<sup>2</sup> so the statutory notice period must again be satisfied.

### Discussion

We are persuaded that we must use our equitable powers to make BN whole. It is true that our error alone prevented BN from recovering since November 1, 1981, the \$10.95 rate specified in Supplement 8. We will authorize the BN to reinstate Supplement 8 with an effective date of November 1, 1981.

We will also require, however, that the railroad refile the tariff on 20 days' statutory notice.

This action alleviates the unjust consequences of our previous unlawful tariff rejection. The Supreme Court has acknowledged that an agency has the power to correct inequities occasioned by its own errors. In *United Gas Improvement Co. v. Callery Properties Inc.*, 382 U.S. 223 (1965), the Court reviewed a Federal Power Commission (FPC) order which required natural gas producers to refund monies charged pursuant to FPC orders later vacated in a judicial proceeding. While recognizing that the FPC (unlike the ICC) did not have the statutory authority to grant a refund, the Court upheld the agency's right to order refunds where excessive rate payments had occurred due to its vacated orders. The Court stated (*Id.* at 229):

[The Commission] is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here, the original certificate orders

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<sup>2</sup>A number "4" enclosed in a square with an accompanying explanatory note placed next to the rate item [200-D] stating that the increased rate is to be effective "beginning with November 1, 1981."

were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order . . . . An agency, like a court, can undo what is wrongfully done by virtue of its order.

In *Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446 (D.C. Cir. 1972), the court directed the FPC to put an aggrieved party in the same position that it would have occupied had that agency not erred in improperly dismissing a complaint concerning natural gas rates. The court determined that the FPC must compensate for its erroneous dismissal so that the "policy of the Natural Gas Act is not arbitrarily to be defeated by uncorrected Commission error . . . ." *Id.* at 452. The corrective measures entailed retroactive rate relief. Despite the FPC's statutory authority to establish rates prospectively only, the court held that:

The measure of the retroactivity which the Commission must grant to cure its legal error is the time elapsed between its wrongful dismissal of the Section 5 case and the time it cured that error by vacating the dismissal and reopening the hearings.

(*Id.*).

The court reasoned that the statutory language governing the FPC's power to determine rates was intended "to protect established expectations under legally established rate schedules. It forbids belated determinations that rates charged in the past were excessive." (*Id.*) While gas buyers had no protection from excessive charges collected during the pendency of a rate hearing, the court discerned no justification for extending that principle to say that the purchasers are unprotected from legal error by the FPC which "wrongfully and unfairly" prolongs that pendency. The court held that the agency could order that "its prospective order should have occurred 112 days earlier." (*Id.* at 453.) Moreover, the court held that the party liable for the refunds could not claim "justifiable reliance or protectable expectations based on FPC action which was illegal . . . [s]ince the legal error causing the delay was sought by and benefitted [that party] . . . ." (*Id.*).

In *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935), the Supreme Court protected the carrier from unfairness by refusing "to make the carrier pay the price" of ICC errors. The Florida Railroad Commission had prescribed maximum rates for long movements within Florida. We found those rates to be unlawfully low and prescribed higher rates which the railroads then charged. Before our order became effective, the Florida Commission issued a new order, providing that its prior order would be suspended "so long as [the] federal Commission's order should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). Our order later was reversed by the Supreme Court for insufficient factual findings. *Florida v. United States*, 282 U.S. 194 (1931). Subsequently, on new evidence and findings conforming to the Supreme Court's earlier opinion, we issued an order setting the maximum rates at the same level as before.

The issue addressed by the Court in *Atlantic Coast Line* was whether the shippers were entitled to restitution for charges collected by the carriers under color of the original Commission rate order that had been reversed for inadequate findings — that is, the difference between the ICC's rate order and the Florida Railroad Commission's rate order. After carefully weighing the equities, the Court held that the shippers were not entitled to restitution because "[w]hat was injustice at the date of the second order of the Commission [i.e., the unreasonably low rates prescribed by the Florida Railroad Commission] is shown beyond a doubt to have been injustice also at the first." 295 U.S. at 316. Noting that "[a] complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether" *Ibid.*, the Court refused "to make the carrier pay the price of the blunders of the commerce board in drawing up its findings" *Id.* at 314.<sup>3</sup>

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<sup>3</sup>See also *National Insulation Transp. Com. v. Aberdeen and Rockfish R. Company*, 365 I.C.C. 624, 628 (1982), where, in another context, we stated that "equitable principles demand that we provide the opportunity for relief to those with valid grievances before us. We

Exercise of our equitable powers here to protect the interests of BN is therefore both proper and appropriate. As a result of Commission error, the \$10.95 rate was wrongfully denied implementation on November 1, 1981. BN will be unable to recoup the revenues lost unless the tariff instrument in which it originally sought to publish a prospective \$10.95 rate is given retroactive effect. The policy of the Interstate Commerce Act should not be arbitrarily undermined by uncorrected Commission error.<sup>4</sup> Moreover, it is now apparent that Congress does not want carriers penalized whose lawful rates are delayed implementation due to the exercise of our administrative function. Previously, when we suspended a rate increase any revenues that the carrier would have earned were never collected. *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 823

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will not permit strict interpretations of our rules . . . to prevent us from adhering to principles of fairness."

<sup>4</sup>See 49 U.S.C. §10704(a)(2) which directs that:

The Commission . . . maintain . . . standards and procedures for establishing revenue levels for rail carriers . . . that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph . . . . Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

The tariff rejection here, if uncorrected, would undermine this statutory admonition by denying BN revenues it would have collected under the effective tariff.

(1973) (Opinion of Marshall, J.). However, under 49 U.S.C. 10707(d)(2), enacted in the Staggers Act, if a suspended increase is ultimately upheld as lawful, the carrier is entitled to obtain the additional revenues from shippers using its service during the suspension period.

Here we have a tariff rejection due to mistaken Commission interference, rather than a suspension. The consequence, however, is the same: the carrier is not allowed to collect its increased rate for a period of time. Reinstatement of Supplement 8 will enable BN to collect the difference between the rate at the Supplement 7 level and the Supplement 8 level for the time period we mistakenly disallowed its effectiveness.<sup>5</sup>

Our action here is not inconsistent with the general rule that tariffs may not be given retroactive effect. Generally, rates applicable to transportation are those in effect when shipments originate. See e.g., *S.A. Gerrard Co. v. Belt Ry. Company of Chicago*, 270 I.C.C. 59, 62 (1948); *Central Lumber Company v. Chicago, Milwaukee & St. Paul Railway Company*, 18 I.C.C. 495, 497 (1910). Here the carrier has not attempted, belatedly, to file a tariff which assesses charges retroactively for shipments moving in a previous time period. Rather, the carrier timely published its tariff in accordance with the statutory notice provision of the Interstate Commerce Act and was denied implementation of its *prospective* rate solely due to our error.

In addition, our action does not conflict with the "filed rate doctrine." This doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1982). In the circumstances

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<sup>5</sup>Although not requested by BN, an alternative that was available to it to recover its shortfall in this instance was a surcharge. See Docket No. 37423, *Temporary Fuel Shortfall Recovery Surcharge*, 364 I.C.C. 336 (1980).

present here, BN properly filed its tariff with the Commission; it was only our error that barred its effectiveness.<sup>6</sup>

We emphasize the narrowness of our holding. The carrier here acted in accordance with the law in attempting to file its tariff supplement. Due to our mistaken interpretation of the Staggers Act, we rejected it. In *Burlington Northern Railroad Company v. ICC*, *supra*, the court ruled that BN's tariff could not be rejected "simply because it [was] above the level specified in an outstanding prescription order or a pre-Act agreement." Our equitable powers have been invoked solely to rectify the wrong we have perpetrated on BN due to our mistaken rejection of its tariff supplement.

We shall require, however, that BN refile Supplement 8 on 20 days' notice. Although IPL did not exercise its right to protest the reasonableness of the rate published in Supplement 4 in October 1981, it did request rejection on other grounds. Due to the unusual posture of this case, we will not penalize IPL for failing to put forward all arguments which would have protected its interests then. In addition, we agree with IPL that Supplement 8 contains new matter. A 20-day notice period will protect the rights of IPL, but will not harm the right of BN to recover lost revenues caused by the tariff rejection decision.

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<sup>6</sup>In *Arkansas Louisiana Gas Co. v. Hall*, *supra* at 577, the Supreme Court identified two bases for the filed rate doctrine: (1) to preserve the agency's primary jurisdiction over rate reasonableness and (2) to insure that regulated entities charge customers only rates of which the agency has been made aware. To the extent our decision here departs from the doctrine, it is nonetheless compatible with it. Since the rate involved may be less than the jurisdictional threshold of Section 10709, there would be no Commission primary jurisdiction to preserve. See *Burlington Northern Railroad Company v. ICC*, *supra* at 936. On the other hand, if it exceeds the threshold, our power to investigate and suspend remains. Moreover, the Commission has been cognizant of BN's tariff filings since this controversy arose. Not only have tariffs been submitted, but the issue has been litigated extensively in federal court.

Because we are acting under our equitable powers here, we will not require IPL to pay the entire back amount immediately. Rather, the parties should apprise us of the monies owed by IPL under the reinstated Supplement 8 and suggest a reasonable payment schedule. We shall then determine the payment schedule.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

**IT IS ORDERED:**

The petition for administrative review is granted. The BN may refile Supplement 8 to Tariff ICC BN 4187-A on 20 days' notice. Upon the effective date of Supplement 8 the BN shall apprise the Commission of the amount of the undercharge created by this action and the parties shall submit to the Commission suggested payment schedules within 30 days thereof.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor concurred with a separate expression. Commissioner Simmons concurred with a separate expression. Commissioner Sterrett concurred in part and dissented in part with a separate expression. Commissioner Andre would allow the tariff to become effective on one day's notice.

(SEAL)

KATHLEEN M. KING  
ACTING SECRETARY

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**CHAIRMAN TAYLOR, concurring:**

In my opinion, our decision contains some unfortunate language which makes it erroneously appear the Commission has so prejudged the issues that we are going to permit the new tariff to take effect regardless of protest. To dispell any false impression, I believe the misleading language should have been removed.

However, despite any unintended implication of prejudgment which may arise from the tenor of what we've said, the fact of the matter is that our decision properly rectifies the Court-determined error by placing the parties in the same positions they would have been in had we not rejected the first tariff. As a result, our determination to accept for filing Supplement 8, on 20 days' notice, will protect the right of IPL and the power of the Commission to investigate and suspend, should it elect to do so, if the rates exceed the jurisdictional threshold.

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COMMISSIONER SIMMONS, concurring:

My decision to put the parties in the positions they would have been in had we not rejected the tariff should not be construed as condoning BN's repeated efforts to avoid its obligation under the letters of agreement. It is based strictly on the view that the Commission should correct its own legal errors. I note that IPL is not precluded from seeking to enforce the letters of agreement in a judicial forum.

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COMMISSIONER STERRETT, concurring in part and dissenting in part:

I agree with the majority's decision to allow the filing of Supplement 8. However, in the circumstances presented here I would permit the tariff to become effective on one day's notice. The majority's decision does not truly make BN whole, as it offers IPL another opportunity beyond that provided by statute to challenge the rate. One day's notice, on the other hand, would put BN in the exact position it would have been in had the Commission not rejected Supplement 4, and would not affect IPL's remedies through court action or complaint filed here.

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**APPENDIX C**

**JUDGMENT**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No. 82-2550

September Term, 1982

Iowa Power and Light Company,  
Petitioner,

vs.

United States of America, et al.,  
Respondents,

Burlington Northern Railroad Co.,  
Intervenor.

[FILED  
Aug 3 1983  
Robert D. St. Vrain  
Clerk]

Petition for Review of an Order of the Interstate Commerce Commission.

This cause came on to be heard on petition for review of an order of the Interstate Commerce Commission, appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition for review be, and it is hereby, denied.

August 3, 1983

Total costs of respondent for briefs  
for recovery from petitioner: \$77.40

Total costs of intervenor-respondent  
for briefs for recovery from  
petitioner: \$106.80

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain  
Clerk, U.S. Court of Appeals, Eighth Circuit  
8/31/83

**APPENDIX D****STATUTES****INTERSTATE COMMERCE ACT, TITLE 49  
UNITED STATES CODE:****§ 10761. Transportation prohibited without tariff**

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (1) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

**§ 10762. General tariff requirements**

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle.

A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly —

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Com-

mission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under

subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incor-

porated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.

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